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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY and EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV and RITA SHAEV,

Respondents.

RESPONDENTS' BRIEF

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v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV and RITA SHAEV,

Respondents.

RESPONDENTS' BRIEF

Rules Involved

The following rules were involved in the determination of this case and are set forth in full text in Appendix F to the Petition for a Writ of Certiorari filed with this Court on September 1, 1977:

Fed. Rule Civ. Proc. 23, 28 U.S.C.
Fed. Rule Civ. Proc. 26(b)(1), 28 U.S.C.
Fed. Rule Civ. Proc. 26(c), 28 U.S.C.
Fed. Rule Civ. Proc. 33(c), 28 U.S.C.
Fed. Rule Civ. Proc. 34, 28 U.S.C.

Questions Presented

1. Did the District Court have discretion to require defendant Oppenheimer Fund, Inc. (the "Fund") to bear the expense of identifying the class members in this case?

2. If the District Court had such discretion, did it, based upon the record in this case, abuse its discretion in requiring the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes?

3. Assuming *arguendo* that the cost of identifying the class members must be regarded as a "notice cost", did the District Court commit reversible error in imposing this cost upon the Fund in this case, where a fiduciary duty pre-existed between the plaintiffs and the defendants herein, and, in addition, where there were special facts and circumstances involved which further warranted not applying the "usual rule" regarding "notice costs" in this case?

Statement of the Case

This is a proceeding to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 22, 1977 which, after rehearing en banc, affirmed the Order of the United States District Court for the Southern District of New York, which determined, among other things, that, under the facts and circumstances of this case, the Fund should bear the cost of culling out the names and addresses of the class members from the Fund's computer tapes. The Court of Appeals held, on the basis of the record in this case, that the District Court did not abuse its discretion in entering said Order.

A. The Pleadings.

This consolidated action was brought by respondents ("plaintiffs") representatively on behalf of themselves and other persons similarly situated who purchased shares of the Fund subsequent to March 15, 1968 (A-21)*, and derivatively on behalf of the Fund (A-28), which is an open-ended investment fund registered under the Investment Company Act of 1940 with net assets in excess of $500,000,000 (A-122). These consolidated actions, which are based upon alleged violations of the Securities Act of 1933 (15 U.S.C. Section 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. Section 78a *et seq.*) and the Investment Company Act of 1940 (15 U.S.C. Section 80(a) *et seq.*), and various rules promulgated thereunder, are brought against defendant Oppenheimer Management Corporation (the "Manager"), which is the investment advisor to the Fund and the general distributor of its shares; defendant Oppenheimer & Co., which owns all of the voting stock of the Manager, and the individual defendants, who are directors of the Fund. Some of the individual defendants are also officers of the Fund, officers and directors of the Manager and/or partners in Oppenheimer & Co. (A-20-56, A-111-112) (PA-3a).**

The complaints in these consolidated actions allege, in substance, that the defendants caused the Fund to issue prospectuses and reports that were false and misleading, in that, among other things, they failed to state that the Fund would purchase "restricted" securities, and failed to describe the risks involved in such purchases. The complaints further allege, in substance, that the defendants caused the Fund to value improperly the restricted se-

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* References are to pages of the Appendix.

** References are to pages in the Appendix to the Petition for a Writ of Certiorari.

curities in the Fund's portfolio, thereby overstating the net asset value of shares of the Fund that were sold to the public; that the defendants caused the Fund to issue prospectuses and reports that were false and misleading in failing to disclose material information relating to the improper valuation of restricted securities in the Fund's portfolio; that the aforesaid conduct constituted a breach of fiduciary duties to the plaintiffs and the class, and that, as a result of the foregoing, persons who purchased shares of the Fund subsequent to March 15, 1968 were caused to pay false and inflated prices for their shares of the Fund. The complaints further allege that, as a result of said improper valuation of restricted securities, the Fund was caused to pay the Manager excessive fees under its management agreement and to redeem shares at inflated prices. The plaintiffs seek to recover damages on behalf of the members of the class who paid excessive prices for their shares of the Fund[1] and derivatively, on behalf of the Fund, to recover any damages sustained by the Fund and the profits made by the other defendants, including the excessive fees paid to the Manager (A-20-56, A-111-112, PA-3a-4a).

The defendants have served amended answers denying any wrongdoing and asserting various affirmative defenses (A-57-90), including an alleged set-off against those members of the class who redeemed shares of the Fund since March 1968, for allegedly excessive amounts, as a result of the overvaluation of restricted securities in the portfolio of the Fund (A-66, A-78-79, A-88-89). In addition, the defendants other than the Fund have asserted in their amended answers that, if they are liable to the class by reason of the overvaluation of restricted securities

[1] The total aggregate damages suffered by the class have been estimated to be in the area of $1,500,000 (Document 93, p. 2 referred to on page A-9 of Appendix).

in the portfolio of the Fund, then the Fund is liable to them to the extent that the Fund has received funds from overvaluation. (A-67, A-89-90).

B. Prior Proceedings.

The three consolidated actions were commenced March 26, 1969, May 12, 1969 and June 18, 1969, respectively, (A-111) and were consolidated for all purposes by order of the Court dated December 17, 1969. (A-113) Thereafter, the plaintiffs conducted extensive discovery proceedings, some of which, as indicated below, related to the identification of class members and the method and cost of sending notice to the class, including the service of two sets of interrogatories, the examination of numerous documents and the oral examination of several officers and directors of the Fund and the Manager and the deposition of the Fund's transfer agent. (A-113, A-163).

C. The Class Action Motion.

On March 30, 1973, plaintiffs moved for an order pursuant to Rule 23(c)(1) of the F.R.Civ.P. declaring that this consolidated action may be maintained as a class action on behalf of all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970 (hereinafter referred to as "the class period"). (A-109-111) In support of their motion for a class action determination, plaintiffs set forth information showing that the requirements for a class action under Rule 23(a) and (b)(3) of the F.R.Civ.P. were met. (A111-120).

Following the submission of the class action motion in March 1973 (and after the Court of Appeals for the Second Circuit rendered its decision in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (*"Eisen III"*), the

plaintiffs, with the approval of the Court, conducted some discovery (principally the deposition of the Fund's transfer agent) to obtain additional information relating to the composition of the class, the identification of class members and the method and cost of sending notice to the class. (A-139-141). The defendants did not object to the proposed discovery, notwithstanding the fact that defendants stated that it would require the Fund's transfer agent to "assemble and compile information and statistical data," (A-133-134) except that the defendants argued that the discovery should be conducted by the use of written interrogatories, unless the plaintiffs paid, in the first instance, and subject to ultimate taxation of costs, the expenses of attendance of an attorney for each of the defendants at the place where the deposition was to be taken (Boston, Massachusetts), including reasonable attorneys' fees to be fixed by the Court. (A-133-134, A-135-136, A-137-138). The District Court, however, in its discretion, denied the defendants' application to require the discovery to be conducted by the use of written interrogatories and also denied the defendants' application to require the plaintiffs to pay, in the first instance, the expenses of attendance of an attorney for each of the defendants at the deposition. (A-163).

Thereafter, the deposition of the Fund's transfer agent, pursuant to the Federal Rules of Civil Procedure, was taken, and the discovery disclosed the following information:

1. There were approximately 121,000 persons who purchased shares of the Fund during the class period; (PA-4a, 5a)

2. The Fund currently had approximately 171,000 shareholders, of whom approximately 103,000 purchased shares of the Fund during the class period; (A-145, PA-5a, 38a)

3. There were approximately 18,000 persons who purchased shares during the class period and were no longer shareholders of the Fund; (PA-5a, 38a)

4. The names and addresses of the persons who purchased shares of the Fund during the class period could be culled out from the computer tapes of the Fund along with information indicating which of these persons were still shareholders of the Fund and which were not; (A-148)

5. The cost of culling out the aforementioned information with respect to the names and addresses of class members, which would involve the use and programming of computers, would be approximately $16,000; (A-148, PA-38a) and

6. There would be a charge of $0.01 per insert in connection with inserting the notice to class members in a regular mailing by the Fund to its shareholders. (A-146).

In December 1973, after the foregoing information had been obtained, plaintiffs, in an affidavit submitted to the Court, modified their application relating to the definition of the class and requested that this action be maintained as a class action on behalf of all persons who purchased shares of the Fund during the class period, and who, like the plaintiffs, were still stockholders of the Fund. (A-142-143). This modification, it was noted, would simplify the issues in the case by eliminating, at least in part, the defense asserted by defendants in their amended answers, to the effect that defendants were entitled to a set-off against those persons who purchased shares in the class period but thereafter redeemed their shares for allegedly excessive amounts as a result of the overvaluation of restricted securities in the Fund's portfolio; it would facilitate the distribution of any recovery to the class and, most

importantly, as explained below, it would obviate the need for culling out the names and addresses of the class members and would thus reduce the expenses involved in connection with the further prosecution of the case as a class action. (A-142-144).

The definition of the class sought by plaintiffs would have obviated the need for culling out the names and addresses of the members of the class from the Fund's computer tapes in order to give notice to the class, since, if all of the members of the class were current shareholders of the Fund, the class notice could then be enclosed in a regular mailing by the Fund to all of its shareholders, which would include all the class members. Thus, the method of giving notice proposed by the plaintiffs would have provided for actual individual notice by mail to all members of the class apprising them of the pendency of the action and of their right to request exclusion from the class pursuant to the provisions of Rule 23. (A-145-147). Furthermore, since the proposed class was defined by the plaintiffs with precision (all persons who purchased shares of the Fund during the class period and were still shareholders of the Fund on a specified date prior to the mailing of the class notice), there would be no problem in entering a judgment in the action, whether favorable or not to the class pursuant to Rule 23(c)(3), describing the persons who were bound by the judgment.[2] (A-146).

Plaintiffs stated that they would pay for the costs of preparing the necessary notices and would pay for any extra costs involved in mailing the class notice in the manner proposed by them, including the cost of inserting the notice in a regular mailing by the Fund to all its

[2] In the event of a recovery in the action, the names and addresses of class members would, of course, be ascertained in connection with the distribution of the recovery. (A-145).

current stockholders. (A-146). It was estimated that these costs, which the plaintiffs were prepared to pay, would be approximatey $5,000. (A-146). If it were necessary, however, to ascertain the names and addresses of the class members in order to give notice to the class, the total costs involved in connection with giving notice would be in excess of $20,000. (A-148). The plaintiffs indicated that, if they were required to pay at that time the expense of identifying the class members as well as the costs of sending notice to the class, they would not continue prosecution of the action as a class suit. (A-148-149).

The defendants opposed the definition of the class sought by plaintiffs which limited the class to persons who were still stockholders of the Fund, presumably because it would limit the *res judicata* effect of this action.[1] (PA-5a, 45a). Defendants also objected to the distribution of the class notice in the manner proposed by the plaintiffs, i.e., directing the notice specifically to those shareholders of the Fund who purchased during the class period and enclosing the notice in a regular mailing of the Fund to all of its 171,000 shareholders, claiming that this method would result in the notice being received by approximately 68,000 shareholders of the Fund who were not members of the class, and that this would somehow have an adverse effect on the Fund, including allegedly precipitating a flood

[1] Since, at the same time, the defendants themselves sought to *limit* the class to persons who purchased shares of the Fund prior to April 25, 1969 rather than April 24, 1970 (A-128), it may well be that, in seeking to have the class defined so as to include persons who were no longer shareholders of the Fund (which would make it necessary to ascertain the names and addresses of the class members in order to give notice to all members of the class), the defendants were principally interested in increasing the expenses involved in connection with giving notice to the class in the hope that the district court would impose these added expenses upon the plaintiffs and that this would prevent the action from proceeding as a class suit.

of redemptions by these shareholders. (A-129-132). In response to defendants' objections, plaintiffs pointed out that, since 1970, the Fund had apprised its shareholders in its proxies, prospectuses and annual reports, no fewer than 13 times, of the pendency of this action, and the nature of the claims alleged herein, and of the fact that, in the opinion of their counsel, and counsel for the Manager, the suits have "no legal merit." Plaintiffs contended that the defendants had not made an adequate showing to support their claims of alleged harm, and that defendants' claims were motivated by a desire to maximize the costs involved in an effort to prevent the action from proceeding as a class suit, and that defendants had not raised any valid objections to the method of giving notice proposed by the plaintiffs. (A-147-148).

All of the issues raised by plaintiffs' motion for a class action determination were fully explored and briefed by the parties and were carefully considered by the District Court prior to its decisions on the motion. On several occasions, the Court requested additional information and briefing with respect to various matters, including the definition of the class, the appropriate method of giving notice to the class in this case, the effect of the decision in *Eisen III* and the appropriate allocation in this case of the cost of culling out a list of class members from the Fund's computer tapes under the discovery rules[4] and in

[4] At a conference with the District Court on June 28, 1974, the use of the discovery rules to ascertain the names and addresses of class members was discussed by counsel and the Court, and the Court requested counsel to submit additional briefs dealing with, among other things, the question of whether the names and addresses of class members may be obtained under the discovery rules, and if so, the appropriate allocation of the cost of discovering this information in this case. On July 16 and July 17, 1974, briefs were submitted by all of the parties dealing with this question. (See Documents 89, 90 (pages 2-6), 92 (pages 6-9), and 94 (pages 9-11) listed in the "Index of Documents Filed," at page A-9.)

light of all the facts and circumstances in the case (Documents 33, 34, 40-43, 45, 49-52, 70, 78, 79, 82-87, 89-98, 101-111, 113).[5]

Decision and Memorandum Order of the District Court

On May 15, 1975, the District Court rendered a decision determining that this consolidated action may be maintained as a class action under Rule 23(b)(3) of the F. R. Civ. P.[6] on behalf of all persons who purchased shares of the Fund between March 15, 1968[7] and April 24, 1970.[8] (PA-2a).

With respect to the definition of the class, the method of giving notice to the class and the allocation of the costs of culling out from the Fund's computer tapes the names and addresses of the class members, the District Court rendered a decision that took into account the respective positions and proposals urged by the parties with respect to these matters, and constituted the Court's considered judgment as to what would be a fair overall disposition of the matter, based upon the particular facts and circumstances in this case. (PA-1a-8a). The Court agreed

[5] References are to documents listed in the "Index of Documents Filed" at pages A-4 to A-12 of the Appendix.

[6] The District Court found that the requirements of a class action under Rule 23 were "clearly met" in the instant case, rejecting defendants' assertions to the contrary, including defendants' claim that the action was unmanageable as a class suit. (PA-4a-5a).

[7] The starting date of the class period was modified in Judge Griesa's memorandum order of September 30, 1975, on consent of the parties, to March 28, 1968. (PA-10a).

[8] The Court rejected the defendants' claim that the class should be limited to persons who purchased prior to April 25, 1969. (PA-6a-7a).

to define the class as requested by the defendants to include those persons who were no longer shareholders of the Fund, and agreed to defendants' related request that notice not be sent out in the manner proposed by the plaintiffs i.e. including the notice in a regular mailing to all current shareholders of the Fund, thereby necessitating the identification of the specific names and addresses of class members in order to send notice to the class. With regard to the matter of culling out the names and addresses of the class members from the Fund's computer tapes, the Court determined that it would be appropriate, on the basis of the facts and circumstances of this case, that this expense, which was necessitated by the defendants' requests with regard to the definition of the class and the method of giving notice to the class, be the responsibility of the defendants, and the Court indicated that the Fund should bear the cost of culling out from its computer tapes the names and addresses of the class members in this case. In reaching this decision, the District Court stated:

> "Moreover, with respect to the cost of culling out the list of class members, I am ruling that this is the responsibility of defendants. Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (PA-6a).

The District Court further determined that the plaintiffs would be responsible for preparing and mailing the necessary notices to the members of the class at their expense. (PA-2a, 8a).

After all parties moved for reargument, the District Court, in a memorandum order dated September 30, 1975,

denied essentially all of the motions for reargument. The District Court indicated in its memorandum order that the cost of culling out the list of class members shall be borne by the Fund without prejudice to the right of this defendant at the conclusion of the action to make whatever claim it would be legally entitled to make regarding reimbursement by another party;[9] and that, as to the mailing of notices, plaintiffs are to have the option of: (a) sending them out in their own mailing, or (b) including them in a regular mailing of the Fund, provided that the notices are sent only to class members and that plaintiffs pay in full the Fund's extra cost of mailing, including the cost of segregating the envelopes going to the class members from the envelopes going to other Fund shareholders. (PA-9a-10a).

The Panel Decision

On June 30, 1976, a three-judge panel of the Court of Appeals[10] determined that the granting of class action status was proper. (PA-25a). A majority of the panel (Judge Hays dissenting) determined, however, that the order of the District Court directing the Fund to bear the

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[9] In its motion for reargument, the Fund had requested the Court to clarify its ruling as to which of the defendants are to bear the cost of culling out the names and addresses, and that, if the Court required the Fund to bear such cost, its ruling should set forth that the payment at this time is an advance and that there has been no determination of the question of contribution. (Document 106, p. 7, A-11). It may be noted that the District Court had, in fact, already indicated, in its decision of May 15, 1975, that the Fund was to be responsible for this cost. (PA-2a). The Manager, in its motion for reargument, asserted that, "[i]f the defendants are to bear the cost of preparing lists, such cost should be advanced in the first instance by the Fund, as provided in the Court's opinion (at p. 2)." (Document 102, p. 5, A-10).

[10] The panel consisted of Circuit Judges Hays and Mulligan and District Judge Palmieri sitting by designation.

cost of culling out the names and addresses of class members from the Fund's computer tapes should be reversed. (PA-25a). In reaching this decision, the majority stated that the cost of discovering information as to the names of class members did not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes (PA-21a-22a); that the discovery rules were inapplicable (PA-21a-23a); that the District Court had no discretion in this matter, and that *Eisen III* and *Eisen* v. *Carlisle and Jacquelin*, 417 U.S. 156 (1974) (*"Eisen IV"*), required the plaintiffs to bear the expense of identifying the class members. (PA-21a-23a). The majority also held that the "usual rule" set forth in *Eisen III* and *Eisen IV* that the plaintiff must bear the "costs of notice," must be applied in the instant case, notwithstanding the fact that a fiduciary duty pre-existed between the plaintiffs and the defendants, including the Fund, and that the District Court had found that the additional expense of culling out the names and addresses of class members from the Fund's computer tapes was attributable to defendants' request with regard to the definition of the class. (PA-15a-21a).

In his dissenting opinion, Judge Hays stated:

> "The majority's decision, ostensibly predicated on the Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin* (*Eisen IV*), 417 U.S. 156 (1974), uncritically treats a discovery issue as notice and indiscriminately applies a rule appropriate to arm's-length relationships to the fiduciary relationship between the parties herein." (PA-25a-26a).

Judge Hays further observed that identification of class members is ascertainable by discovery:

> "When identification is sought information allowing a party to proceed with his suit is at the core of the request. Thus, in purpose and effect such a request is not different in kind from other requests for information routinely made during discovery. That a suit will be unable to proceed absent identification does not vitiate the validity of characterizing identification as a product ascertainable by discovery and governed by the rules applicable thereto. A contrary view clearly is belied by the common practice of establishing jurisdiction by means of discovery." (PA-27a-28a).

After noting that the allocation of the expense involved in obtaining such information traditionally rests within the sound discretion of the district court and should not be disturbed absent a showing of abuse of discretion, Judge Hays concluded that the District Court had not abused its discretion in the instant case in requiring the Fund to bear the cost of culling out the names of class members from the Funds' computer tapes. Judge Hays said:

> "* * * expense remains an issue properly resting within the sound discretion of the district judge. Under the facts of this particular case the district judge did not consider the costs of processing the defendant's tapes an 'undue burden or expense.' It is not our practice to disturb the discretionary judgment of a district court in the realm of discovery absent a showing of abuse, *see, e.g., Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *H.L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories*, 384 F.2d 97 (2d Cir. 1967), and discovery of class members should provide no exception. Imposing the cost of culling out the names of members of the class upon the Fund involved no abuse of discretion. The district court, finding this expense attributable to defendants' objections to plaintiffs' efforts to define a subclass minimizing expenses, cf.

Eisen IV, supra at 179, n.16, did not commit reversible error in refusing to shift this burden to plaintiffs." (PA-29a).

Judge Hays also reasoned that even if the expense involved in identifying members of the class must be regarded as a "notice cost" rather than a discovery expense, the "usual rule" should not be applied in the instant case since the Investment Company Act clearly imposed a fiduciary duty of the highest order between the defendants and the plaintiff class and that, under these circumstances, the District Court might properly impose said cost upon the Fund in this case. (PA-29a-31a). In reaching this conclusion, Judge Hays noted that the application of the "usual rule" to the instant case would create "a serious potential for insulating fiduciary breaches from redress." (PA-31a).

The Court of Appeals *En Banc* Decision

On September 14, 1976 the Court of Appeals granted the plaintiffs' petition for a rehearing *en banc* with respect to the question of whether the District Court had committed reversible error in directing the Fund to bear the cost of culling out the names and addresses of the class members from the Fund's computer tapes.

On rehearing *en banc*, the Court of Appeals[11] (Mulligan, Van Graafeiland and Meskill, *JJ.*, dissenting) affirmed the order of the District Court directing the Fund to bear the expenses of culling out the names and addresses of class members from the Fund's computer tapes.

The Court of Appeals rejected the contention that the plaintiff in all cases must bear the cost of discovering in-

[11] The *en banc* court consisted of Chief Judge Kaufman and Circuit Judges Hays, Feinberg, Mansfield, Mulligan, Oakes, Timbers, Gurfein, Van Graafeiland and Meskill.

formation as to the names and addresses of class members as part of his obligation under *Eisen IV* to bear the cost of printing and mailing the notice to the class. (PA-39a-40a). In rejecting this contention, the Court of Appeals stated that the information sought by plaintiffs as to the names and addresses of the members of the class was within the broad scope of permissible discovery established by the Federal Rules, and that Rule 34, which is specifically applicable to the discovery of computerized information, provided an ample basis for the District Court's order directing the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. (PA-40a-41a).

The Court of Appeals further stated that while the District Court has discretion under Rule 34 coupled with Rule 26(c) of the Federal Rules to shift the cost of discovery of computerized information to the discovering party where the demand for information would impose upon the respondent "undue burden or expense", the District Court did not abuse its discretion in declining to do so in the instant case, based upon the facts and circumstances in this case. (PA-41a, 43a-44a). In reaching this conclusion, the Court of Appeals indicated that, although compliance with the District Court's order involved an expenditure by the Fund of approximately $16,000, the Court of Appeals could not say that the burden thus imposed was unreasonable in light of the nature of the information sought and the extent and character of the Fund's business operations. (PA-43a, 44a-45a). The Court of Appeals also stated that the order of the District Court allocating the cost of discovery of the computerized names and addresses of the class members was not unreasonable in light of the District Court's definition of the class. The Court of Appeals noted that the cost of discovering the names and addresses of the class members was occasioned by the

District Court's agreement to define the class as sought by the defendants. (PA-45a-46a).

In conclusion, the Court of Appeals stated:

> ". . . [W]e are not disposed to hold that the District Court's refusal to impose on plaintiffs the cost of discovery of the computerized names and addresses was an abuse of discretion. Indeed, the order of the District Court accommodated the competing interests in a manner which was fair and imaginative." [12] (PA-46a).

Summary of Argument

1. The District Court had discretion to require the Fund to bear the expense of identifying the class members in this case. *Eisen IV* did not hold, as defendants contend,

[12] The Court of Appeals noted that its affirmance of the District Court's order was without prejudice to a claim by the defendant Fund for discretionary taxation of the cost of discovery of the names and addresses of the class members against plaintiffs, should the plaintiffs ultimately lose. (PA-47a). The Court further noted that the plaintiffs' "present unwillingness to pay this cost does not immunize them from a judgment for costs, nor does it necessarily diminish the deterrent effect of such a judgment against a strike suit." (PA-47a). The Court also pointed out that, as a result of the decision by the District Court, it will cost the plaintiffs $20,000 in comparison to the $5,000 expense that their proposed class definition and method of notice would have entailed (PA-38a, 46a), and that the "requirement that plaintiffs bear the $20,000 expense of notifying the class is itself a formidable deterrent to frivolous litigation, for, if plaintiffs lose, they cannot recover their disbursements." (PA-47a). It may also be noted, in connection with the foregoing, that, while plaintiffs in December 1973 indicated to the District Court that they would not continue the prosecution of the action if they were then required to pay the expenses involved in identifying the class members, plaintiffs have never asserted that, if the defendants were ultimately to prevail and if the district court in its discretion taxed these expenses against them, they would not or could not meet their legal obligations at the conclusion of the case.

that information as to the names and addresses of the class members may not be obtained through discovery nor did it indicate that the cost of obtaining this information must be borne in all cases by the plaintiff, as part of his obligation to bear the cost of printing and mailing the notice to the class. There are significant factual and legal differences between what is involved in obtaining or discovering information as to the names and addresses of class members, and what is involved in the mechanical tasks of preparing and mailing a notice.

It has been well recognized that information as to the names and addresses of class members is relevant to the subject matter of a class action and may be obtained under the discovery rules. Such information was needed by plaintiffs in this case pursuant to the order of the District Court in order to insure compliance with the requirements of Rule 23(c)(2). The allocation of expenses involved in the discovery of information, whether germane to class action requirements or to the merits of the case, has traditionally rested within the sound discretion of the district courts; and the district courts' determinations with respect to the allocation of such expenses have been disturbed only upon a showing that there has been an abuse of discretion.

The question of whether the plaintiff or the defendant should bear the cost of discovering or obtaining information as to the names and addresses of class members, which, as in the instant case, is in the possession of the defendants, should rest, as it traditionally has, within the sound discretion of the district court, which is in the best position to evaluate properly all of the relevant facts and circumstances in each case and to resolve this question in a fair and equitable manner. The adoption of an inflexible rule that would deprive the district court of any discre-

tion in this matter might well produce inequitable results in cases, particularly where information as to the names and addresses of class members has been computerized by the defendants.

The decision in this case should not be based, as defendants urge, upon specious policy arguments or grossly distorted and unfounded claims about class actions generally, which have been set forth by defendants, but rather upon the facts and the law in this case.

The determination by the Court below that the District Court had discretion to require the Fund to bear the expense of identifying the class members in this case is well supported by the federal rules and by applicable case law and is fully compatible with the principles set forth by this Court in *Eisen IV*.

2. The District Court did not abuse its discretion, based upon the record in this case, in requiring the Fund to bear the expense of culling out the names of class members from its computer tapes. Rule 34 of the Federal Rules, which is specifically applicable to the discovery of computerized information, provides ample foundation for the District Court's order, in the instant case, requiring the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. It is well settled that, under the discovery rules, parties may be required to furnish information calling for investigation or accumulation of data even though a considerable burden or expense may be involved, and that in order to shift the expense to the other side, the responding party must show not only that the request for information is burdensome or expensive but that the burden or expense is so excessive as to be unreasonable or oppressive.

The determination by the Court below that the District Court, while it had discretion to shift the expense of special computer programming to the plaintiffs, did not abuse its discretion in declining to do so in this case, is well supported by the record in this case. As the Court below found, it cannot be said that "the burden thus imposed is unreasonable in light of the nature of the information sought and the extent and character of the fund's business operations". (PA-44a). Furthermore, as the Court below indicated, the District Court's order allocating the costs of discovery of the computerized names and addresses of class members was not unreasonable in light of the fact that this added cost was attributable to the defendants' request with regard to the definition of the class.

3. Even if the cost of identifying the class members must be regarded as a "notice cost" under *Eisen IV*, the District Court could properly impose said "notice cost" on the defendant Fund in this case since there was a fiduciary duty of the highest order which pre-existed between the plaintiffs and the defendants herein, and, in addition, there were special facts and circumstances involved in the case, i.e. the added cost of identifying the class members was necessitated by the defendants' request with regard to the definition of the class, which provided further justification for departing from the "usual rule" regarding the payment of "notice costs" in this case. This Court, in *Eisen IV* noted that the usual rule that the plaintiff must bear the "cost of notice" may not apply where, as in this case, there was a fiduciary relationship between the plaintiff and the defendant. In *Eisen III*, it was also indicated that justification may exist for holding that the plaintiff is not obligated to bear the cost of notice where, as in this case, there are special facts and circumstances involved.

POINT I

The District Court Had Discretion to Require the Fund to Bear the Expense of Identifying the Class Members in This Case.

Defendants contend that the plaintiff is required in all cases to bear the cost of discovering or obtaining information as to the names and addresses of class members under *Eisen IV* as part of his obligation to bear the cost of printing and mailing the notice to the class. Defendants' reliance upon *Eisen IV* in this regard is, however, misplaced. *Eisen IV* did not hold that information as to the names and addresses of class members may not be obtained through discovery, nor did it indicate that the cost of obtaining this information must be borne in all cases by the plaintiff. Indeed, *Eisen IV* did not even deal with the question of allocating the costs of obtaining information as to the names of class members.[13]

Defendants argue, nevertheless, that it is a prerequisite to sending the notice mandated by *Eisen IV* that plaintiffs obtain the names and addresses of those to whom the notice will be sent,[14] and therefore the cost of obtaining this

[13] In *Eisen*, the defendants had agreed to bear the cost of providing the names and addresses of those class members who could be identified, "in the first instance with ultimate costs to abide the event . . ." (*See* Appendix to *Eisen IV* at page A-185). Thus, the "costs of notice" that were the subject of discussion in *Eisen IV* did not include the expense of identifying the class members and were limited to the costs of preparing and mailing the notice.

[14] Identification of class members is not necessarily a prerequisite in all cases to sending notice to the class, as asserted by defendants. Indeed, in the instant case, the method of notice of the class proposed by plaintiffs i.e. including the notice in a regular mailing by the Fund to all its shareholders, would have satisfied the requirements of Rule 23, without necessitating the specific identification of class members prior to mailing the notice. See p. 8 *supra*.

information must be borne by the plaintiff under *Eisen IV*. Defendants' argument is not well founded. First, defendants mistakenly assume that, simply because it may be necessary to obtain the names and addresses of class members prior to giving notice to the class, this information may not be obtained under the discovery rules. If this were true, it would also follow that information relating to the definition of the class, to whether the members of the class "can be identified through reasonable effort" and to what is "the best notice practicable under the circumstances," all of which must also be obtained prior to giving notice to the class, could not be obtained through discovery. Yet, in this very case, discovery was permitted by the District Court without objection by the defendants with respect to these matters and other matters relating to the method and cost of sending notice to the class.

Defendants' argument also totally ignores the significant factual and legal differences between what is involved in obtaining *information* as to the names and addresses of class members and what is involved in preparing and mailing the notice. The preparation and mailing of the notice are matters which the plaintiff may attend to on his own without relying upon the defendants to accomplish these mechanical tasks. Furthermore, the costs of preparing and mailing the notice are not dependent upon anything within the possession or control of the defendants. It is quite a different matter, however, with respect to obtaining information as to the names and addresses of class members which, as in the instant case, is in the possession and control of the defendants. The plaintiffs must look to the defendants to secure this information in order to comply with the notice requirements of Rule 23(c)(2)[15] and the

[15] Defendants disingenuously assert that plaintiffs do not need this information in order to comply with the notice requirements

cost of obtaining this information may be affected by the actions of the defendants. Under such circumstances, the creation of a hard-and-fast rule, as urged by the defendants, which would require the plaintiff to bear the cost of obtaining said information in all cases and which would deprive the District Court of all discretion in this area, might well create a significant potential for abuse which would produce inequitable results in many cases. In this connection, Judge Hays, in his dissent to the panel's decision noted that there were serious dangers involved in so restricting the discretion of the District Court, particularly in dealing with the recovery of computerized information. Judge Hays said:

> "Since the disclosing party has opted to keep his records on computer tapes, there is good reason to allow the district court the usual discretion as to costs of retrieving information from those tapes lest discovery be obstructed by irretrievably burying information to immunize business activity from later scrutiny." (558 F.2d at 645 n.17; PA-28a).

In *Eisen IV*, this Court held that the costs of printing and mailing the notice are in the usual case the responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV, supra*, at 179. The expenses involved in the discovery of information, however, have not been automatically regarded as part of the ordinary burden of a party of financing his own suit, but rather the allocation of such expenses has traditionally rested within the sound discretion of the district courts. *Eisen IV*

in this case. Petitioners' Brief, pp. 22, 49. Under the Order of the District Court, however, the plaintiffs have the responsibility for mailing the notice to all class members, including those who are no longer shareholders of the Fund. Thus, the plaintiffs must have this information if they are to insure that the required notice is set to all class members as required by the District Court.

did not hold, as defendants at times seem to suggest, that all costs attributable to instituting a class suit, including the costs of discovering or obtaining information relating to the class action requirements, must be borne by the plaintiff in each case, notwithstanding the well-settled rule that the allocation of these expenses should rest in the sound discretion of the district court.[16] Matters pertaining to discovery of information, whether they relate to class action matters,[17] as in the instant case, or to the merits of the case, have been left to the sound discretion of district courts; and the district courts' determinations with respect to the allocation of discovery expenses have been disturbed only upon a showing that there has been abuse of discretion.[18]

[16] We agree with defendants' assertion, at page 19 of their Petition for a Writ of Certiorari, that this Court in *Eisen IV* did not intend to distinguish between "class actions and other forms of adversary proceedings." Yet, this is precisely what defendants urge this Court to do by seeking to have this Court distinguish between the discovery of information that is relevant to the subject matter of a class action and the discovery of information in other forms of adversary proceedings.

[17] It is well settled that plaintiff is entitled to conduct discovery with respect to a broad range of matters which pertain to the maintenance of a class action under Rule 23. See 3B *Moore's Federal Practice* §23.50, p. 136 (1976-1977 Supplement); 7A Wright and Miller, *Federal Practice and Procedure*, §1785, p. 131 (1972 ed.); *Branch* v. *Reynolds Metals Co.*, 17 F.R. Serv.2d 494, 495 (E.D. Va. 1972); *Dickerson* v. *United States Steel Corp.*, 18 F.R. Serv.2d 554, 555 (E.D. Pa. 1974); *Shapiro* v. *Merrill Lynch*, 70 Civ. 3653 (S.D.N.Y. 1974 unreported decision).

[18] The assertion by the defendants that the decision below is improper because it forces the defendants to subsidize the suit against them, is without merit. A defendant in any lawsuit, whether it be a class action or not, is frequently required to bear substantial expenses in connection with discovery conducted by the plaintiff. Thus, it could be argued in any case that, whenever a defendant is required to bear the cost of providing information to the plaintiff in connection with discovery, which information may be used by the plaintiff in prosecuting his suit (or may

Thus, it has been well recognized that information as to the names and addresses of class members is relevant to the subject matter of a class action and may be obtained under the discovery rules. As the Court below stated:

> "It hardly requires our extended discussion to establish that the information sought by plaintiffs as to the names and addresses of the members of the class is indeed within the broad scope of permissible discovery established by our Federal Rules. Under Rule 26, '[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . .' Fed. R. Civ. P. 26(b)(1). The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are 'relevant to the subject matter' of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. A list of the names and addresses of the class members would of course be essential to the resolution of that issue. *See Appleton Electric Co.* v. *Advance United Expressways*, 494 F.2d 126, 138 (7th Cir. 1974); *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972), . . ." [19] (558 F.2d at 648; PA-40a)

be even essential to the continued prosecution of his suit where the information pertains to matters such as the existence of jurisdiction), the defendant has been forced to subsidize the suit against himself. It is well settled, however, that it is not improper, per se, for a defendant to be required to bear such expenses. The issue is, rather, whether compliance with the discovery demand would impose upon the defendant "undue burden to expense." The determination of this issue rests within the sound discretion of the district court. *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *H. L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories*, 384 F.2d 97 (2d Cir. 1967); *Harvey* v. *Eimco Corp.*, 28 F.R.D. 381 (E.D. Pa. 1961).

See also, Hickman v. *Taylor*, 329 U.S. 495, 507 (1947), where this Court indicated that the discovery rules "are to be accorded a broad and liberal treatment"; *Burstein* v. *Slote*, 12 F. R. Serv. 2d 577, 580 (S.D.N.Y. 1968); and *Chevalier* v. *Baird Sav. Ass'n*, 72 F.R.D. 140, 148 (E.D. Pa. 1976).

In *Burstein* v. *Slote, supra*, the Court stated:

> *"In view of the mandatory notice requirement of Rule 23(c)(2)* (once an action is judicially determined to be maintainable as a class suit), and no indication present that plaintiffs are abusing the *discovery rules* so as to harass defendants, *plaintiffs are permitted to inquire of defendants on oral examination as to the names of the purchasers of securities of Manufacturers Credit Corp. and its related entities, . . ."*

[19] In *Appleton Electric Co.* v. *Advance-United Expressways*, 494 F.2d 138 (7th Cir. 1974) the Court of Appeals held that the District Court had not abused its discretion in requiring the defendant carriers to provide the names and addresses of shippers who were members of the class, notwithstanding the testimony by defendants as to the difficulties and costs involved in furnishing this information. In reaching this conclusion, the Court said:

> ". . . [I]n view of the broad discovery of class members permitted in this circuit. . . ., it would indeed be anomalous to place restrictions on discovery in this refund case." (494 F.2d at 138) (citations omitted)

The District Court in *Appleton* did not require the defendants to provide information as to the names of class members in order to "penalize" the defendant carriers, as defendants herein assert, but rather because the information as to the names of class members was in possession of the defendants and said information, which, as the Court indicated, was subject to discovery, was needed to send notice to the class.

"Plaintiffs, of course, may not use this information to notify other members of the putative class of the pendency of these actions unless and until they are denominated class actions by court order." (Emphasis supplied.) 12 F. R. Serv. 2d at 580.

In *Chevalier* v. *Baird Savings Assoc., supra,* the Court stated:

". . . [W]e agree with plaintiffs that the names of the class members are discoverable. Quite clearly they fall within the ambit of rules 34 and 26(b) of the Federal Rules of Civil Procedure. And since the cost of identification would be fairly nominal for the defendants (approximately $14,500 spread over 22 banks) we are inclined to think that we would not enter a protective order, or require plaintiffs to reimburse defendants for the costs of collecting this information." 72 F.R.D. at 78.

Notwithstanding the foregoing authorities to the contrary, the defendants contend that information as to the names and addresses of class members may not be obtained pursuant to the discovery rules. Defendants argue that discovery of information relating to the identification of class members must be distinguished from discovery of information generally, presumably because the former relates to certain class action requirements in the case. Carried to its logical conclusion, the defendants would make the discovery rules inapplicable to other matters (in addition to the identification of class members) that are germane to the requirements for maintaining a suit as a class action under Rule 23, such as the description of the class, the number of class members, etc.[20] Such a result

[20] If this were the case, plaintiffs might find it impossible to demonstrate to the Court that the various requirements of Rule 23 have been satisfied.

would be clearly unsound and unfounded in either the federal rules or case law.[21] If plaintiffs are permitted under the discovery rules, as we believe is clearly the case, to obtain information as to the definition or scope of the class, the number of class members, the appropriate method of giving notice etc., it would be arbitrary, we submit, to hold that the plaintiffs may not obtain information under the discovery rules as to the names and addresses of the class members so as to satisfy the requirements of Rule 23(c)(2) that individual notice be mailed to all members of the class who can be identified through reasonable effort.

The fact that Rule 23(c)(2) provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," does not, as defendants contend, indicate that the identification of class members is not subject to discovery. If this were true simply because the identification of class members is referred to in the same paragraph of Rule 23(c)(2) as the provisions for giving notice to the class, it would also follow that information relating to whether the members of the class "can be identified through reasonable effort" or what is "the best notice practicable under the circumstances," which are also referred to in the same paragraph of Rule 23(c)(2), would not be obtainable through discovery. Yet, as noted above, in this very case discovery was permitted by the District Court, without objection by the defendants, with respect to these matters and other matters relating to the method and cost of sending notice to the class. If such information may be obtained through discovery, there is no logical basis for the contention that information relating to the names and addresses of class members is not subject to discovery,

[21] *See* text and cases cited, *supra,* page 25, footnote 17 and pages 26-28.

and the courts have specifically recognized, as indicated above, that, because of the mandatory notice requirements of Rule 23(c)(2), a plaintiff should be allowed to obtain information pursuant to the discovery rules as to the names of class members.

The defendants also make the rather disingenous argument that, while information as to the names and addresses of class members may be relevant in determining whether the requirement of Rule 23(c)(2) that individual notice be sent to all members of the class who can be identified through reasonable effort has been satisfied, the fact that this issue has not yet been presented to the Court for adjudication makes said information irrelevant to the subject matter of this class action. It is evident, however, that information that is otherwise relevant to the subject matter of the action, and thus, within the permissible scope of discovery, is not rendered irrelevant and outside the scope of discovery, as defendants urge, simply because, the issue with respect to which the information relates has not yet been presented to the Court for adjudication.[22] Defendants' self-serving assertion (at page 50 of their brief) that this issue "would not be raised by the Fund . . . nor the plaintiffs . . ." [22a] simply begs the question. The issue of whether the requirements of Rule 23(c)(2) have been satisfied depends upon information with respect to the names and addresses of the class members that is contained in the Fund's computer tapes and thus, this information is clearly relevant to the subject matter of this action.

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[22] It is well recognized that information sought to be discovered need not even be relevant to the "issues" in the case and that "relevancy to the subject matter is all that is required". 8 Wright & Miller, *Federal Practice & Procedure* §2008 at 41-42.

[22a] Defendants are silent as to whether the issue might be raised by any of the other defendants in the case, by any member of the class, or by the District Court on its own motion.

The defendants rely heavily upon the decision in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) in support of their contention that the plaintiff must bear the cost of identifying the names and addresses of class members in every case and that the district court has no discretion in the matter. The decision in *Nissan*, however, does not support the defendants' contention. In *Nissan*, the Court, after noting that its "review of the class action issues raised in this appeal is limited to whether the district court abused its discretion," (552 F.2d at 1096), considered the particular facts and circumstances involved in the case, and on the basis thereof, the Court determined that plaintiffs should be required at their expense to compile a list of the names and addresses of the class members from the defendants' business records. The Court did not base its determination on any hard-and-fast rule as to which party should bear the expense of obtaining information with respect to the names and addresses of class members. Indeed, the Court noted that "[e]xamination of the decisions treating this question reveals that . . . both plaintiffs and defendants have been ordered to compile information necessary to the identification of absentee class members," and that, in almost all of these cases, the district courts had appeared to have adopted a "rule of reason" approach involving the determination of which of the parties would have the easier task of gathering the information sought (552 F.2d at 1101). Furthermore, while indicating that in their opinion the discovery rules should not "control the question's final resolution," the Court in *Nissan* stated that "the spirit of those rules and the decisional law developed under them may offer guidance in resolving which party should furnish absentee class members' names and addresses" (552 F.2d at 1102). It is thus apparent that the decision in *Nissan* requiring the plaintiffs to bear the expense of com-

piling a list of the names and addresses of class members is based upon the particular facts involved in that case and not upon a hard-and-fast rule.

The defendants' contention that a substantial majority of the relevant cases have made no distinction between the costs of printing and mailing the notice and the costs involved in obtaining information as to the names and addresses of class members, is also totally unfounded. In the cases referred to by defendants in their brief (p. 26, fn. 18), the question of whether the cost of obtaining information as to the names and addresses of class members should be borne by the plaintiffs or the defendants was determined by the courts on the basis of the particular facts and circumstances in each case, notwithstanding the fact that *Eisen IV* requires the plaintiff to bear the cost of printing and mailing the notice. If the cost involved in discovering or obtaining information as to the names and addresses of class members had been simply regarded in these cases as part of the cost of printing and mailing the notice, as defendants urge, then these decisions, particularly those rendered since *Eisen III* and *Eisen IV*, would not have turned upon the particular facts and circumstances in each case, as they do, nor would they have resulted in the costs being borne by the defendants[33] in

[33] *E.g.*, *Foster* v. *Maryland State Sav. & Loan Ass'n*, 1974-2 CCH Trade Cases ¶75,277 (D.D.C. 1974); *Chevalier* v. *Baird Sav. Ass'n., supra; Richardson* v. *Hamilton International Corp.*, 62 F.R.D. 413 (E.D.Pa. 1974); *Hawkins* v. *Holiday Inns, Inc.*, 1975-1 CCH Trade Cases ¶ 60,153 (W.D. Tenn. 1975); *City of New York* v. *Darling-Delaware, Inc.*, 1976-1 CCH Trade Cases ¶ 60,012 (S.D.N.Y. 1976); *Lamb* v. *United Security Life Co.*, 59 F.R.D. 25 (S.D. Iowa 1972); *B&B Investment Club* v. *Kleinert's Inc.*, 1973-74 CCH Fed. Sec. L. Rep. 1 ¶ 94,451 (E.D.Pa. 1974); *Herbst* v. *Able*, 47 F.R.D. 11 (S.D.N.Y. 1969); *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969). In each of these cases, the information with respect to the names and addresses of class members, as in the instant case, was in the possession of the defendants. In *Foster*, the information was contained in the defendants' computer tapes.

some cases and the plaintiffs[34] in others. None of the cases cited by the defendants support their broad contention that in every case, plaintiffs *must* bear the expenses involved in obtaining information as to the names and addresses of class members as part of their obligation under *Eisen IV* to bear the costs of printing and mailing the notice.

Defendants refer several times to the decision in *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969) as authority for their contention that the plaintiffs must bear the costs of identification of class members in all cases. In *Berland* v. *Mack, supra*, however, the Court required the defendant, at its expense, to furnish to the plaintiffs a list of the names and addresses of the members of the class. Moreover, it is evident that Judge Mansfield, who issued the decision in *Berland* v. *Mack, supra*, did not regard that decision as supporting the defendants' position since he concurred in the decision of the Court below upholding the District Court's determination requiring the Fund to bear the cost of identifying class members in this case.

Defendants' citation of *In re Penn Central Securities Litigation*, 560 F.2d 1138 (3rd Cir. 1977) is also inapposite. The *Penn Central* case involved the question of whether several brokerage houses which held shares for their customers in street name should be reimbursed for their costs in sending a class action settlement notice to the beneficial owners of the stock. The brokers had been

[34] *In re Memorex Security Cases* 61 F.R.D. 88 (N.D. Cal. 1973) (plaintiffs agreed to pay cost of identifying class members); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484 (N.D. Ill. 1969) *reh. denied* 401 U.S. 950 (1971) (information in possession of plaintiffs); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976) (information available from public lists or non-party business organizations); *In re Antibiotic Antitrust Actions*, 333 F.Supp. 278 (S.D.N.Y. 1971) (information in possession of plaintiffs or available from non-party sources).

directed by an *ex parte* order to forward the settlement notice to their customers. After complying with the order, the brokers sought reimbursement. The District Court, however, denied reimbursement, even for "reasonable postage expenses" which the *ex parte* order had specifically provided the brokers should receive. In reversing the District Court's determination, the Court of Appeals placed great weight upon the fact that the brokers had not been allowed to decide for themselves whether to send the settlement notice to their customers but rather had been directed to do so by the District Court in the *ex parte* order and that they had incurred these costs in complying with said order. In reaching its decision, the Court of Appeals indicated that the issues presented in the *Penn Central* case were quite different from those in the instant case. The Court noted that the instant case dealt with a defendant and its record shareholders rather than non-party brokerage houses who held stock in street name and that, unlike the instant case, the District Court in *Penn Central* had issued its *ex parte* order (which simply directed the brokers to mail the settlement notice to their customers) without any consideration of the discovery rules [35]

In the final analysis, defendants, in a vain effort to bolster their position, in effect argue that this Court should reverse the decision of the Court below, not on the basis of the specific facts in this case or the authorities relating thereto, but rather on the bold assumption that class actions

[35] As noted above, (p. 10) in the instant case, a request for information as to the names and addresses of class members pursuant to the discovery rules (if such information was required prior to giving notice) was orally made by plaintiffs at a conference with the Court in June 1974. Thereafter, the question of whether the names and addresses of class members could be obtained under the discovery rules and the appropriate allocation of the cost of discovering this information was briefed by the parties.

are bad, that they serve no useful purpose and that they must be discouraged. In support of this "policy" argument, defendants, relying essentially upon excerpts from a few articles, some of which were written by persons who have frequently represented defendants in class actions, have set forth a one-sided, totally distorted, and largely unfounded description of class actions.

While it is obvious that not every class action which is brought is meritorious or beneficial, it has been well recognized that the class action device serves a very important function in our society and in our judicial system in insuring the effective enforcement of the federal laws including the securities laws, in deterring wrongful conduct, including violations by corporate officials of their fiduciary duties and in vindicating the rights of individuals whose claims are too small to justify separate legal action but which are of a significant size if taken as a group. *See e.g., Eisen IV, supra* (Douglas J., dissenting in part). *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968) *cert. denied*, 395 U.S. 977 (1966); *Blackie* v. *Barrack*, 524 F.2d 891 (9th Cir., 1975); *Escott* v. *Barchris Construction Corp.*, 340 F.2d 731 (2d Cir. 1965).

Mr. Justice Douglas, in his opinion, concurred in by Mr. Justice Brennan and Mr. Justice Marshall in *Eisen IV*, made the following statement about class actions:

> "I agree with Professor Chafee that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration. I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are

consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. . . ."

"The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth." 417 U.S. at 185-186.

The following observations by Judge Weinstein in the New York Law Journal, May 2, 1972, p.4, Column 3, which were cited by Mr. Justice Douglas in his opinion in *Eisen IV* (417 U.S. at 417 U.S. at 186) are also quite pertinent:

"Where, however, public authorities are remiss in performance of this responsibility for reason of inadequate legal authority, excessive workloads or simple indifference, class actions may provide a necessary temporary measure until desirable corrections have occurred. The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.

"The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including . . . investors who are victimized by . . . misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.

"When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct."

In *Green* v. *Wolf Corp., supra,* the Court underscored the importance of the class action device in cases involving violations of the securities laws, stating:

". . . '[t]he ultimate effectiveness of the federal remedies when the defendants are not prone to settle may depend in large measure on the applicability of the class action device.' 3 Loss, Securities Regulation 1819 (2d ed. 1961)." 406 F.2d at 295.

In *Blackie* v. *Barrack, supra,* the Court also stressed the substantial role played by class actions in deterring violations of the federal securities laws, stating:

"The availability of the class action to redress such frauds has been consistently upheld . . . in large part because of the substantial role that the deterrent effect of class actions plays in accomplishing the objectives of the securities laws". 524 F.2d at 903.

In *Escott* v. *Barchris Construction Corp., supra* the Court said:

". . . [T]here is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." 340 F.2d at 733.

Even some of the articles from which the defendants have quoted just excerpts have recognized the important

function of class actions. *See, e.g.*, Dam, *Class Action Notice: Who Needs It? The Supreme Court Rev.—1974*, 97, 121 (1975) where the author states:

> "The importance of vindicating small claims should not be underestimated. The law has always considered compensation important, and surely deterrence is one of the main functions of the antitrust, securities, and other laws under which class actions have been frequent. Moreover, the deterrence function is not always adequately performed by public agencies, sometimes because of inadequate public sanctions, sometimes because of the nature of bureaucracies, and sometimes because of meager agency budgets."

See also, Meyer, *The Social Utility of Class Actions*, 42 Brooklyn Law Review 189, 206 (1975) ("In the nine years since Rule 23 has been amended, class actions have proven to be a vital force. During that time society has witnessed an elevation of standards on the part of accountants, attorneys, corporate directors and other fiduciaries, as well as significant advances in the civil rights and environmental law areas. No doubt, much of this is due to forces other than the threat posed by private attorneys general. But, the deterrent supplied by the possibility of substantial monetary liability for overstepping legal bounds may not be gainsaid; nor may the substantial restitution already effected in many class actions be ignored."); and Block, *Class and Derivative Actions Under The Securities Laws* 26 Business Lawyer 425 (1970) ("Corporate management may feel that the class action device serves only to encourage what are called strike-suits. But we are past the point of serious regard for such a view. At this stage in the development of the law, we must recognize that without such a device, genuine wrongs may go unpunished and the law of our time will not permit that result.")

The specific criticisms of class actions made by the defendants in their brief are, also, in the main, either totally unfounded or greatly exaggerated. A comprehensive empirical study of class actions recently prepared at the direction of Senator Warren G. Magnuson for the use of the Committee on Commerce of the United States Senate[35] (hereafter referred to as "Class Action Study") clearly refutes virtually all of the contentions made by the defendants. For example, in discussing defendants' contention that class actions are a form of "legalized blackmail" which are used to force large settlements through the filing of frivolous claims, the Class Action Study stated:

> "Critics have charged that a defendant faced with a class action is forced to settle even if plaintiff's claim is weak. However, defendants in those cases which have been completed evidently preferred initially to press for dismissal or summary judgment and did not feel pressed to settle. . . ."
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> ". . . interviews with defendant attorneys disclosed that no more than a handful would label their opponents' cases as frivolous. If frivolous cases are brought, the high proportion of dismissals or summary judgments indicates that the class action is not a very effective tool for forcing settlements. Moreover, defendant attorneys interviewed indicated that if faced with a weak suit they certainly would fight it on the merits initially before agreeing to settle." (Class Action Study at pp. 9-10)

The Class Action Study also shows that defendants' claim that class actions do not benefit the members of the class

[35] Senate Committee on Commerce, Class Action Study, 93rd Cong., 2d Sess. (June 1974).

because attorneys' fees and other expenses of litigation substantially deplete any recovery and, in addition most class members do not bother to collect their share of the recovery, is also unfounded. First of all, the Class Action Study reveals that in 81% of the cases in which damages had been recovered, recovery exceeded $100,000; in 38% of the cases, damages exceeded $1 million;[27] and in 13% of the cases damages exceeded $5 million. After a careful review of these cases, the Class Action Study concluded that "[t]here is no evidence that class recoveries were depleted substantially by the costs of administering the suit or by attorneys' fees." (Class Action Study at pp. 21, 27). Furthermore, with regard to the distribution of damages, the Class Action Study found that "[t]he problem of unclaimed funds has not arisen in most cases. . . ." The report indicates that in 50% of the cases studied, "all funds designated for class recovery were distributed to the class and in an additional 30% of the cases, "less than 5% of the class recovery was left unclaimed" (Class Action Study at p. 28).

Finally, defendants' contention that class actions impose a heavy burden upon the federal courts is refuted by both the figures compiled by the Administrative Office of the United States Courts and by the aforesaid study conducted for the Senate Committee on Commerce. According to the 1977 Annual Report issued by the Administrative Office

[27] In several class actions, the benefits to the class have been enormous. E.g., *In Re Equity Funding Corporation of America Securities Litigation*, MDL Docket No. 142 (C.D. Cal. September 29, 1977) (unreported order) (the recovery for the class was approximately $60 million); *In Re Gypsum Cases* 386 F. Supp. 959 (N.D. Cal. 1974) (the settlement fund was approximately $75 million in addition to savings of at least $86 million resulting from the abandonment of the conspiracy by the defendants in the course of the litigation.)

of the United States Courts,[28] class actions filed during the fiscal year 1977 decreased by 10.9% from the prior year and constituted only 2.4% of all civil cases filed during said fiscal year. At the end of fiscal 1977, class actions represented only 4.1% of all civil cases pending. (See 1977 Annual Report, page 121). Furthermore, the Class Action Study, after making an in-depth study of all of the cases filed in the United States District Court for the District of Columbia[29] came to the following conclusion:

> "An examination of the cases filed in the United States District Court for the District of Columbia reveals that class actions have less impact on the court's work load than critics assert and at least in the District of Columbia, class actions do not appear to place an overwhelming burden on the federal district court." (Class Action Study at p. 4).

This study added:

> "It can be said . . . that most class actions do not take marketedly longer from filing to disposition in district court than do civil actions in general." (Class Action Study at p. 12).[30]

[28] Administrative Office of the United States Courts, 1977 Annual Report of the Director for the Twelve Months Period ending June 30, 1977 (hereinafter referred to as "1977 Annual Report").

[29] At the time this study was made, the United States District Court for the District of Columbia ranked fourth among the 94 districts in the country in the number of class actions pending. (Class Action Study page 3).

[30] The fact that class actions may impose some additional modest burden upon the federal courts surely does not justify, as defendants urge, reversing the decision of the Court below, in order to reduce the number of class actions in the federal courts. As one commentator notes:

"Juxtaposed against the judicial burden created is the more important consideration of class action desirability. If class

See also Note, *Allocation of Initial Notice Costs Under Federal Rule 23(c)(2)*, 1973 Illinois Forum, 723 (1973), cited by defendants (p. 31), which also specifically rejects the various arguments made by the defendants against class actions generally:

> "The arguments against the public interest benefits of class actions are not convincing in view of the requirements of federal rule 23 and the ultimate benefits of the class action to society. Under rule 23, the trial court must determine whether the suit can be maintained as a class action and can dismiss the suit if it is unmanageable. Since the defendant has an opportunity to argue against the rule 23 motion by contending that the suit is unmanageable, he is not deprived of his constitutional rights if the court decides that the class action can be maintained. If the defendant settles, his decision is a choice not to defend an action which the court, in an adversary proceeding, has decided is maintainable; it is not the result of legalized blackmail. Furthermore, even though a defendant may raise its prices to cover the costs of the settlement, the class action ultimately benefits the consumer through a deterrent effect; industries are encouraged to engage in fair and honest economic practices."

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actions do indeed provide an assessible remedy to the injured and once impotent small claimant, it is hardly a countervailing argument to state that this remedy imposes an additional burden upon the courts. It is precisely for the purpose of adjudicating claims and of providing appropriate remedies that courts have been created; if their workloads become excessive, the solution lies in the allocation to them of more resources, not in the excision of their remedial functions." Meyer, *"The Social Utility of Class Actions,"* 42 Brooklyn L. Rev. 189, 196 (1975).

It is also well to keep in mind that since the federal courts have *exclusive* jurisdiction over various federal substantive laws, including the securities laws, the effective enforcement of these federal laws will be adversely affected, if class actions in the federal courts are substantially curtailed, as defendants urge.

It is evident from the foregoing that defendants' claims regarding class actions are not well founded. While there are certainly imperfections in the class action device, it has been well established that class actions do serve an important function in our judicial system. Accordingly, it would not be appropriate, as defendants urge, to establish a hard-and-fast rule requiring the plaintiff in every case to bear the cost of obtaining information from the defendant as to the names and addresses of class members, for the purpose of discouraging class actions generally. The adoption of such a rule that would adversely affect all class actions, whether meritorious or not, would be akin to the fallacy of—to use a proverbial expression—"throwing out the baby with the bath water." The decision in the instant case, therefore, should not be based, as defendants urge, on specious policy arguments about class actions generally, but rather upon the facts and the law in this case.

The question of whether the plaintiff or the defendant should bear the cost of discovering or obtaining information as to the names and addresses of class members, which, as in the instant case, is in the possession of the defendants, should rest, as it traditionally has, within the sound discretion of the district court. The district court is in the best position to evaluate properly all of the relevant facts and circumstances in each case and to resolve this question in a fair and equitable manner.[31]

The decision by the Court below affirming the District Court's discretionary determination in this case on the basis of the specific record herein, does not create any hard-and-

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[31] As noted earlier (pp. 23-24), there is a significant danger that the adoption of an inflexible rule that would deprive the district court of any discretion in the matter would produce inequitable results in cases, particularly where information as to the names and addresses of class members has been computerized by the defendant, or where there are, as in the instant case, special facts and circumstances. *See infra* pages 48-51.

fast rules. It leaves the matter within the sound discretion of the district court to be determined on the basis of the facts and circumstances in each case.[32]

We respectfully submit that the determination by the Court below that the District Court had discretion to require the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes is well supported by the federal rules and by applicable case law, and is fully compatible with the principles set forth by this Court in *Eisen IV*.

POINT II

The District Court Did Not Abuse Its Discretion, Based Upon the Record in This Case, in Requiring the Fund to Bear the Expense of Culling Out the Names of Class Members From Its Computer Tapes.

It is well recognized, as noted earlier, that the district court has broad discretion in matters of discovery, including the allocation of expenses relating thereto, and that the discretionary judgment of the district court should not be disturbed absent a showing of abuse of discretion.[33] (*See*

[32] There is certainly no reason to believe, as defendants purportedly do, that the district courts, in exercising their discretion, will ignore the legitimate interests of the defendants, or will permit abuses to take place in dealing with the identification of class members or the discovery of computerized information.

[33] In *Brown* v. *Thompson*, 430 F.2d 1214, 1216 (5th Cir. 1970), the Court in reviewing a discretionary determination by the district court in a discovery matter, observed:

> "The judges of the Court of Appeals might well feel that under like circumstances they would have exercised the judicial discretion in a manner different from that in which it was exercised by the trial court. But this is not a basis for reversing the determination of the trial court. The test is whether there has been an abuse of that discretion. . . ."

cases cited, pp. 25-26, footnote 18). Rule 34 of the Federal Rules, which is specifically applicable to the discovery of computerized information provides ample foundation for the District Court's order in the instant case requiring the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. As noted by the Court of Appeals, the 1970 amendments to the Federal Rules rendered Rule 34 specifically applicable to the discovery of computerized information:

> "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a printout of computer data." Advisory Committee Note, 48 F.R.D. 459, 527 (1970). (558 F.2d at 648-49; PA-41a)

It is also well settled, as noted above, that under the discovery rules, parties may be required to furnish information calling for investigation or accumulation of data, even though a considerable burden or expense may be involved. If the information sought is relevant, a responding party, under the federal discovery rules, in order to shift the expense to the other side, must show not only that the request for information is burdensome or expensive but that the burden or expense is so excessive as to be unreasonable or oppressive. Specifically, with regard to the ob-

ligation of a responding party under the Federal Rules to provide information that is contained in computer tapes, Professors Wright and Miller state, in their well-known treatise:

> "The responding party who is required to prepare a print-out or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.' In many instances the peculiarities of computerized information actually will oblige the disclosing party to engage in fairly sophisticated electronic manipulation and analysis of the data in his computer system." 8 Wright & Miller, Federal Practice and Procedure, § 2218 at 659. (Footnote omitted.)

The Court of Appeals below, while, of course, recognizing that the District Court has discretion under Rule 34 coupled with Rule 26(c) to shift the expense of special computer programming to the discovering party where the demand for information would impose upon the respondent "undue burden or expense," held that the District Court did not abuse its discretion in declining to do so in the instant case, based upon the facts and circumstances in this case.

In reaching this conclusion, which is well supported by the record in this case, the Court of Appeals referred to several factors. First of all, the Court indicated that, although compliance with the District Court's order would require an expenditure by the Fund of approximately $16,000, "we cannot say the burden thus imposed is unreasonable in light of the nature of the information sought

and the extent and character of the fund's business operations" (PA-44a).[34] In contending that the Court of Appeals should not have given any consideration to these factors, the defendants have totally confused the issue. In concluding that the expense involved was not unreasonable, the Court of Appeals did not, as defendants, seem erroneously to suggest, base its determination upon a comparison of the relative resources of the defendant Fund and the plaintiffs. Rather, the Court of Appeals considered whether, in light of the nature of the information sought and the extent and character of the Fund's business operations, the burden of compliance with the discovery demand in this case was excessive.[35] It was surely not improper for the Court of Appeals to have taken into account the foregoing facts in determining whether the District Court

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[34] In reaching this conclusion, the Court of Appeals noted that the cost to the Fund (which has net assets in excess of $500,000,000) of identifying the names and addresses of each present or former shareholder who is a member of the class, was only $.13. The Court further noted that computers may occasionally make information more difficult to discover, that even where a party adapts his computer software strictly in accordance with legitimate business purposes, complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used, and that it was scarcely unreasonable to demand of a respondent that it employ its computer resources to provide discoverable information of a relatively simple nature where, as in the instant case, the respondent Fund makes extensive use of computers in the operation of its business.

[35] In this connection, the Court of Appeals also observed:

> "There is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of business-related information than might be expected of one whose business is small and simple. Great corporations, for example, must expend millions to provide to the government information necessary to comply with internal revenue laws; an individual taxpayer may provide the required information at a cost to himself of a mere few dollars." (558 F.2d at 650; PA-44a-45a).

had abused its discretion in this case. Defendant's assertion that the Court of Appeals was precluded from considering these factors by *Eisen IV* is completely unfounded.

As indicated by the Court of Appeals, the order of the District Court allocating the costs of discovery of the computerized names and addresses of the class members was not unreasonable, moreover, in light of the District Court's definition of the class as sought by the defendants.

The plaintiffs had sought to re-define the class to exclude former shareholders of the Fund, which would have obviated the need for culling out the names and addresses of class members from the Fund's computer tapes and would have allowed the individualized notice mandated by *Eisen IV* to be inserted, at small expense, in one of the Fund's regular mailings.[36] The defendants, however, opposed the class re-definition, presumably because it would limit the *res judicata* effect of this action,[37] and defendants also op-

[36] The modification sought by plaintiffs would also have simplified the issues in the case since the defendants had alleged that they were entitled to a set-off against those persons who had purchased shares of the Fund in the class period but, thereafter redeemed their shares for allegedly excessive amounts as a result of the overvaluation of restricted securities in the Fund's portfolio. See page 7, *supra*. In this connection, the Court of Appeals noted in its opinion that "the issues presented might have been somewhat different for those who had sold their shares than those who were still shareholders; the members of the former group might not have been damaged by the alleged overvaluation of the Fund's net assets." (PA-45a).

[37] As noted above, since defendants themselves had sought to limit the scope of the class in certain other respects, it may well be that defendants, in opposing the redefinition of the class proposed by plaintiffs were principally interested in increasing the expenses involved in connection with giving notice to the class in the hope that the District Court would impose these added expenses upon the plaintiffs and that this would prevent the action from proceeding as a class suit. See page 9, *supra*. It is also interesting to note that, on one hand, defendants contend in their brief (p. 31) that a larger class may have been preferable in the instant case

posed the proposed method of notice, on the ground that the proposed notice to all the Fund's shareholders would allegedly prejudice the Fund by notifying the shareholders of the Fund not involved in the litigation.[38]

The District Court agreed to have the class defined and notice given in the manner requested by the defendants, thereby necessitating the added cost of discovering the names and addresses of class members from the Fund's computer tapes, which cost the District Court required the Fund to bear, stating that:

> "*Moreover,* with respect to the cost of culling out the list of class members, I am ruling that this is the responsibility of defendants. Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and *it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense.*" (Emphasis added). (20 F.R.Serv. 2d at 1221; PA-6a).

Notwithstanding the foregoing express statement by the District Court, the defendants argue that, since the District Court rejected the plaintiffs' proposed redefinition of the class, the District Court, in allocating this added cost of discovery, should not have taken into account the fact that this added cost was attributable to the defendants' request with regard to the definition of the class. What the defendants clearly ignore is that the District Court's

in order to reduce the possibility of "repetitive litigation" and, yet, on the other hand, defendants themselves had sought to restrict the scope of the class and assert also in their brief (p. 31) that there was only "slight" likelihood of subsequent claims being filed if the class had been reduced as proposed by plaintiffs.

[38] See discussion of facts relating to defendants' opposition to proposed method of notice on pages 9-10, *supra*.

rulings in this case with regard to the definition of the class, the method of giving notice and the allocation of the costs of culling out the names of class members from the Fund's computer tapes were obviously interrelated[39] and reflect the District Court's considered judgment as to a fair overall disposition of this matter, taking into account the respective positions and proposals urged by the parties with respect to these matters. The District Court could have defined the class as proposed by the plaintiffs, consistent with the principles of Rule 23,[40] but determined in-

[39] The interrelationship of the District Court's rulings in this case is further evident from the fact that, after referring to defendants' objections to sending the notice to all current shareholders of the Fund, the District Court stated:

"... My solution to this problem starts with my earlier ruling that it is the responsibility of defendants to cull out from their records a list of all class members and provide this list to plaintiffs' (20 F.R.Serv.2d at 1222; PA-8a).

[40] In this connection, the Court of Appeals stated:

"The considerations advanced by the defendant in opposition to plaintiffs' proposed class redefinition were undoubtedly entitled to some weight; still, they did not *require* the class definition ultimately accepted by the district court. *See Eisen IV*, 417 U.S. at 179 n.16 and *Eisen III*, 479 F.2d at 1023 (Oakes, *J.*, dissenting from denial of rehearing en banc) (raising possibility that class may be divided into subclasses pursuant to Rule 23(c)(4) so as to minimize cost of notice borne by representative plaintiff). *Cf. Eisen III*, 479 F.2d at 1009 n.5 (suggesting that notice may be included in regular mailing by defendant to class members)." (Emphasis supplied by the Court.) (558 F.2d at 651; PA-46a).

See also, Dolgow v. *Anderson*, 43 F.R.D. 472, 498 (E.D.N.Y. 1968) (indicating that if notice to those persons who are no longer stockholders of defendant Monsanto would create a problem, "it might be necessary to limit the classes to include only those who could be provided with notice from current Monsanto shareholder lists"); *State of Illinois* v. *Harper & Row Publishers*, 301 F.Supp. 484, 494 (N.D. Ill. 1969) (granting class certification notwithstanding the fact that "the restriction of the classes' scope appears arbitrary"); and *Zachary* v. *Chase Manhattan Bank*, 52 F.R.D. 532 (S.D.N.Y. 1971); *Dolgow* v. *Anderson, supra*, at 500, and *Popkin* v. *Wheelabrator-Frye, Inc.* [1974-1975 Transfer Binder], CCH Fed. Sec. L. Rep. ¶ 95,068 (S.D.N.Y. 1975) (approving insertion of notice in a regular mailing by a corporate defendant to its stockholders in order to reduce the cost of giving notice to the class).

With respect to the method of giving notice proposed by the plaintiffs, the Court below also noted in its opinion that "under Rule 23(c)(2) the district court could have supervised the form of notice included in one of the Fund's regular mailings, so as to avoid undue prejudice to the Fund," and that "[i]n any event the Fund has already notified its shareholders on many occasions of the pendency of this litigation." (PA-46a). *See also, Miller* v. *Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971), which was cited with approval in *Eisen IV*, where the Court rejected a claim by the defendant that sending a class notice to the shareholders of the defendant who had already been apprised of the litigation in prospectuses and letters sent by the defendant to them would "seriously injure the financial position" of the corporation.

[41] The Court below noted that "... the draftsman of Rule 34 chose—wisely, in light of the relative judicial inexperience with the discovery problems posed by computer technology—not to burden discovery of computerized information with the more rigid principle of Rule 33(c)." (558 F.2d at 650; PA-43a-44a)

stead, in the exercise of its discretion, to grant the defendants' request with regard to the definition of the class and to require defendants to bear the additional discovery expenses involved in defining the class as sought by them. It is evident from a fair reading of the entire opinion of the District Court that the District Court took into account the "partisan demands" of the defendants in deciding upon the definition of the class and in determining to require the Fund to bear the additional expenses involved in culling out the names of class members from its computer tapes.

None of the cases cited by the defendants dealing with the discovery rules (most of which focus on Rule 33, which as the Court below indicated, unlike Rule 34, "was not especially tailored to the discovery problems posed by contemporary computer technology," [41] (558 F.2d at 649; PA-42a) shows that the District Court abused its discretion in this case in

refusing to shift the burden of the expense involved in identifying class members from the Fund to the plaintiffs. For example, in *In re Nissan Motor Corp., Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), which is relied upon heavily by defendants, the information as to the names and addresses of class members was not contained in computer tapes, as in the instant case, but rather in the defendants' ordinary business records. Indeed, in reaching its decision, the Court in *Nissan* carefully distinguished the decision in *Foster* v. *Maryland State Sav. and Loan Ass'n.*, 1974-2 CCH Trade Cases ¶75,277 (D.D.C. 1974), where the defendant was required to bear the cost of providing the names and addresses of class members on the ground that, in *Foster*, the names and addresses of the class members were contained in the defendant's computer tapes. Furthermore, in *Nissan*, unlike the instant case, the defendants had not sought to have the class defined in a manner that necessitated the expense of obtaining information as to the specific names and addresses of class members.

The cases cited by defendants do not set forth any hard-and-fast rules with regard to the allocation of discovery expenses. Rather, the cases indicate that the matter is to be determined within the discretion of the District Court based upon the facts and circumstances presented by the particular case. In the instant case, as the Court of Appeals observed, "the order of the district court accommodated the competing interests in a manner which was fair and imaginative." (558 F.2d at 651; PA-46a)

We respectfully submit that the District Court, based upon the record in this case, did not abuse its discretion in requiring the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes.

POINT III

Even If the Cost of Identifying the Class Members Must Be Regarded as a "Notice Cost", Under *Eisen IV*, the District Court Did Not Commit Reversible Error in Imposing This Cost Upon the Fund in This Case, Since the District Court May Properly Impose Notice Costs Upon a Defendant Where, as in This Case, a Fiduciary Duty Pre-existed Between the Plaintiff and Defendant and, in Addition, There Were Special Facts and Circumstances Present That Made the Application of the "Usual Rule" Regarding Payment of "Notice Costs" Inappropriate.

Since the Court below found that the cost of culling out the names and addresses of class members from the Fund's computer tapes was in the nature of a discovery expense, rather than a "notice cost", the Court below did not have to reach the issue of whether "notice costs" may properly be imposed upon the defendant where a fiduciary duty pre-existed between the plaintiff and defendant and where, in addition, there are special facts and circumstances present that make the application of the "usual rule" inappropriate.

We submit, however, that Judge Hays correctly stated, in his dissent to the panel's decision, that, under such circumstances, the "usual rule" need not be applied, and that assuming, *arguendo*, the cost of identifying the class members must be regarded as a "notice cost" under *Eisen IV*, the District Court could properly impose said "notice cost" upon the defendants in this case.

Both the Court of Appeals in *Eisen III* (479 F.2d at 1009, n. 5) and this Court in *Eisen IV* noted that the usual rule that the plaintiff must bear the cost of notice may not apply "where a fiduciary duty pre-existed between the plaintiff and the defendant, . . ." *Eisen IV*, *supra*, at 178. The defendants, while recognizing this possible exception

to the usual rule, have construed this exception so narrowly as to make it essentially meaningless, and have also based their contention that this exception should not apply in this case upon certain erroneous factual assumptions. The defendants argue that this exception should be limited to situations where the defendant is essentially in the position of a corporation in a shareholder's derivative suit. In *Eisen IV*, however, this Court cited *Dolgow* v. *Anderson*, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968), as an example of a case that might present such an exception to the usual rule. See *Eisen IV*, *supra*, 178, fn. 15. In *Dolgow*, the defendant clearly was not in the position of a corporation in a derivative suit. Indeed, in *Dolgow*, which, like the instant case, was a class action brought by plaintiffs on behalf of purchases of securities, the defendants were in essentially the same position as the defendants in the instant case. In the portion of the opinion in *Dolgow* specifically cited by this Court in *Eisen IV*, the Court indicated that a defendant corporation may be required to bear the cost of notice based upon the "fiduciary duty owed to purchasers of stock by the corporation. . . ." *Dolgow*, *supra*, at 498.

It may be noted, in passing, that the grounds referred to by the Court in *Dolgow*, in the portion of the opinion in *Dolgow* specifically cited by this Court in *Eisen IV*, as providing a basis for requiring the defendant corporation to pay the cost of notifying the members of the class, e.g., the fiduciary duty between the defendants and the plaintiff class, and the advantages to the defendants of a judgment with *res judicata* affect against the class, are present in the instant case.[42] The Fund, as indicated below, clearly

[42] It should be noted that while the Court in *Dolgow* was discussing the question of whether the aforementioned grounds justified imposing the entire cost of notice upon the defendants, in the instant case, all that the District Court has required the Fund to bear is the cost involved in culling out the names of class members from the Fund's computer tapes, a cost that has been necessitated by the defendants themselves. The District Court has required the plaintiffs to pay all of the costs of preparing the notice and any extra costs of mailing involved in sending out the notice, separately or in a regular mailing of the Fund to the class members, including the cost of segregating the envelopes going to the class members and the envelopes going to other shareholders. In addition, under the District Court's decision, the plaintiffs will bear the full cost of sending out the notice to those members of the class who were no longer shareholders of the Fund.

has a fiduciary obligation to the members of the class, and the class has been defined, as requested by the Fund and the other defendants to include persons who are no longer shareholders of the Fund so that the defendants will have the advantage of a judgment with broader *res judicata* effect.

It is evident that neither this Court in *Eisen IV* nor the Court of Appeals in *Eisen III*, in noting that the usual rule requiring the plaintiff to bear the cost of notice under Rule 23 may not apply "where a fiduciary duty pre-existed betwen the plaintiff and the defendant", could have intended to limit the fiduciary relationship exception to situations involving shareholder's derivative suits, since a shareholder's derivative suit is not even a class action under Rule 23, but rather is covered by Rule 23.1, which does not require that a notice be sent out, comparable to the notice required by Rule 23(c)(2) apprising shareholders of the pendency of the action and the right to opt out. Rule 23.1, on the contrary, requires that notice be sent out only in connection with a dismissal or compromise of the action.

There can be no doubt that there was a fiduciary relationship between the plaintiffs and the defendants in the instant case. Indeed, Congress has, in the Investment Company Act, imposed fiduciary duties of the highest order upon the defendants to the plaintiffs and the class. In this con-

nection Judge Hays, in his dissenting opinion to the panel's decision, stated:

> "Unquestionably the relationship between the Fund shareholders and the defendants herein is of a fiduciary nature. As one court has observed, the Investment Company Act 'impose[s] fiduciary obligations of the highest order upon persons who control investment companies.' *Securities and Exchange Commission* v. *Advance Growth Capital Corp.*, 470 F.2d 40, 55 n.21 (7th Cir. 1972). *See,* Investment Company Act of 1940, 15 U.S.C. §80a-35. So too, '[t]he Investment Advisors Act of 1940 . . . reflects a congressional recognition "of the delicate fiduciary nature of an investment advisory relationship. . . ."' *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963), *quoting* 2 Loss, Securities Regulation (2d ed. 1961) at 1412. It is the breach of these fiduciary duties which is at the core of this suit." (558 F.2d at 646; PA-30a-31a)

The defendants, nevertheless, contend that the fiduciary relationship between the parties herein should be disregarded and that the "usual rule" should be applied in the instant case, based upon two grounds, both of which, we submit, are unfounded. First, the defendants assert that certain considerations pointed to in justification for shifting the cost of notice from the plaintiff to the defendant in *Dolgow,* such as the strength of plaintiff's case and the ability of the defendant to bear the costs, have been subsequently held to be inappropriate. It does not follow, however, simply because it has been determined that *these* considerations do not justify imposing the cost of notice upon the defendant, that other considerations, such as the existence of a fiduciary relationship between the plaintiffs

and the defendants, which both *Eisen III* and *Eisen IV* have indicated may justify the imposition of notice costs upon the defendants, should be disregarded.[43] The inevitable result of the approach urged by the defendants herein would be the creation of an inflexible rule that the plaintiff in a class action must pay the cost of notice, irrespective of legitimate considerations, like those in the instant case, which *Eisen III* and *Eisen IV* have indicated may properly influence the court in determining who should bear the cost of notice.[44]

The defendants also base their claim that the fiduciary relationship exception should be disregarded and the usual rule should apply in the instant case upon the mistaken assumption that the Fund is not a party to the class action claims and has no direct interest in the outcome of said claims. The defendants conveniently ignore the facts that the defendants other than the Fund have asserted cross-claims against the Fund in their amended answers, alleging that, if they are liable to the class by reason of the overvaluation of restricted securities in the portfolio of the Fund, then the Fund is liable to them to

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[43] Defendants argument would seem to suggest that the reference in *Eisen IV* to *Dolgow* as an example of a case that might present an exception to the usual rule was meaningless.

[44] We do not contend that the district court *must,* in all cases where there is a fiduciary relationship between the defendants and the plaintiff class impose the cost of notice upon the defendants. There need not be a rigid rule. The district court, however, should have the power in those cases *not* covered by the "usual rule", such as where the defendants have a fiduciary duty to the plaintiff class, to determine the proper allocatjon of the costs of notice. In this connection, we note that the instant case is a particularly appealing one for not applying the usual rule since the fiduciary duty involved in this case is of the "highest order", and, in addition, there are special facts and circumstances involved in the case, i.e. the added cost of identifying the class members was necessitated by the defendants' request with regard to the definition of the class, which further justified departing from the usual rule.

the extent that the Fund has received funds from the class by reason of such overvaluations (A-67, A-89-90).[45] Thus, contrary to the defendants' contention, the Fund does have a direct interest in the outcome of the class action claims.[46]

The reasons for not applying the usual rule in cases like the instant one, where a fiduciary relationship exists between the defendants and the plaintiffs were cogently set forth by Judge Hays in his dissent from the panel decision, as follows:

> "When the defendants assumed their positions with the Fund they knew, or clearly should have known, that the law imposes very strict standards upon their conduct. Their relationship to the plaintiff class is one of trust; the entire scheme of our investment company and advisor regulation is predicated upon that trust being respected inviolate. A breach of a fiduciary duty traditionally has been considered a much graver transgression than, for example, breach of a contractual duty . . . . In cases involving fiduciaries, . . . the usual rules traditionally have been modified to insure that the trust relationship is not abused.

[45] It is also evident that while the plaintiffs demanded damages from the Manager and the directors rather than the Fund, the complaint does allege a violation of fiduciary duty by the Fund to the plaintiffs and the class, since the Fund is alleged to have issued false prospectuses and reports, to have improperly valued restricted securities in the Fund's portfolio, and to have sold shares of the Fund to the plaintiffs and the class at inflated net asset values. (A-24-28).

[46] Defendants also suggest that requiring the Fund to bear the costs involved "may well be unfair to shareholders that have not joined the class" (Petitioners' Brief, p. 36). It is reasonable to assume in this case, however, that a majority of the Fund's shareholders would approve of the Fund's bearing these expenses, since approximately 60% of the Fund's shareholders are members of the class (A-145, PA-5a, 38a).

> The norms appropriate in the context of arms-length bargaining are simply inapposite in the fiduciary context. Thus, the usual rule should not apply to preclude class action when to do so creates a serious potential for insulating fiduciary breaches from redress." (555 F.2d at 646 PA-31a)

In *Eisen III*, which was affirmed by this Court in *Eisen IV*, the Court noted that justification may exist for holding that the plaintiff is not obligated to bear the cost of notice where there are special facts and circumstances involved in the case.[47] In the instant case there were special circumstances present, i.e. the added cost of identifying the class members was necessitated by the defendants' request with regard to the definition of the class,[48] which

[47] *The Court stated in Eisen III:*

> "Nor did we decide or intend to say [in *Eisen II*, 391 F.2d (2d Cir. 1968)] that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, *depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration.* It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. *See* Advisory Committee's Note, 39 F.R.D. 69, 107." (Emphasis Supplied) 479 F.2d at 1009, fn. 5.

[48] See discussion at pp. 48-51 supra.

provided further justification (in addition to the existence of the fiduciary relationship between the defendants and the plaintiffs herein) for departing from the usual rule in this case.

We respectfully submit, in light of the foregoing, that even if the cost of identifying the class members was a "notice cost" that the district court could properly impose this cost upon the Fund, in the instant case, and that it did not commit reversible error in doing so.

CONCLUSION

The Judgment of the Court of Appeals for the Second Circuit Should Be Affirmed.

Respectfully submitted,

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